



*NATIONAL WETLAND MITIGATION
BANKING STUDY
Model Banking Instrument*

**Institute for Water Resources
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The NWMBS is being conducted within the IWR Policy and Special Studies Division, whose Chief is Eugene Stakhiv. The study manager is Robert Brumbaugh.

The document was prepared under the direction of Robert Brumbaugh. Fari Tabatabai (Corps, Los Angeles District) prepared the initial drafts of the model banking instrument while on developmental assignment to IWR. The model instrument benefitted from the substantial and invaluable comments from Tom Kelsch (U.S. Environmental Protection Agency Wetlands Division) and Jack Chowning (Corps Headquarters Regulatory Branch), co-chairs of the interagency staff-level mitigation banking working group that prepared the Federal Mitigation Banking Guidance (issued in the Federal Register on 28 November 1995). Mark Miller (U.S. Fish and Wildlife Service), Susan-Marie Stedman (National Marine Fisheries Service), and John Gleason (Corps, Los Angeles District) also provided comments. Finally, this document benefitted greatly from the very critical review of Jim Monroe (Corps, Sacramento District).

BANKING INSTRUMENT
[NAME OF THE MITIGATION BANK]

This Banking Instrument regarding the establishment, use, operation, and maintenance of *[name of the wetland mitigation bank]* (hereinafter, the Bank) is made and entered into by and among *[name of the wetland mitigation bank sponsor]* (hereinafter, Sponsor), the U.S. Army Corps of Engineers (Corps), the U.S. Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (FWS), National Marine Fisheries (NMFS) *[if applicable]*, Natural Resources Conservation Service (NRCS) *[if applicable]*, *[list other Federal, State, tribal and/or local agencies, who are signatory to the instrument]*, with reference to the following:

Federal
Policy
Document
Reference

I. PREAMBLE

Sec. II.C.3

A. Purpose: The purpose of this Banking Instrument is to establish guidelines and responsibilities for the establishment, use, operation, and maintenance of the Bank. The Bank will be used for compensatory mitigation for unavoidable impacts to waters of the United States including wetlands which result from activities authorized under Section 404 of the Clean Water Act, *[list other applicable programs for which credits from the bank are expected to be used, e.g., Section 10 of the Rivers and Harbors Act, the Swampbuster provisions of the Food Security Act, State or local wetland regulatory programs, other Federal programs]* provided such use has met all applicable requirements and is authorized by the appropriate authority.

Sec. II.C.2

B. Location and Ownership of Parcel: Whereas, *[ownership of bank lands]* owns ____ acres of land at *[provide address of the parcel, including County and State]*, (Exhibit A), and the Sponsor has developed a mitigation plan to establish and/or maintain ____ acres of ____ *[type of habitat]*. *[Also include owner of water rights for the property, if applicable.]*

Sec. II.C.2

C. Project Description: Whereas, under this Banking Instrument, the Sponsor will establish and/or maintain ____ acres of aquatic habitat in accordance with the provisions of this Banking Instrument and the Bank Development Plan (Exhibit B), and shall then maintain the Bank in such condition for ____ years in accordance with the bank closure procedures or until all credits are sold, whichever is later. The Bank area shall consist of a total of ____ acres and include *[provide detailed description of wetland type(s) to be established and/or maintained, including size, expected hydrologic conditions and vegetation community. Use the Classification of Wetlands and Deepwater Habitats of the United States, Cowardin, et al., 1979; the Hydrogeomorphic Classification For Wetlands, Brinson, 1993, or other similar classification system, as appropriate]*.

Sec. II.C.2

D. Baseline Conditions: Whereas, the Bank area is currently *[provide detailed description of current conditions of site, including assessment of any existing aquatic functions that the site currently provides]*.

E. Establishment and Use of Credits: Whereas, in accordance with the provisions of this Banking Instrument and upon satisfaction of the success criteria contained herein, a total of ____ credits will be available to be used as mitigation in accordance with all applicable requirements. *[May include other information, as appropriate, regarding the general use of credits, e.g., whether credits will be used by bank sponsor or sold to third parties]*

F. Whereas, the Mitigation Banking Review Team (MBRT) consists of:

Sec. II.C.3

1. U.S. Army Corps of Engineers, ____ District (Corps), Chair.
2. U.S. Environmental Protection Agency, Region ____ (EPA).
3. U.S. Fish and Wildlife Service, ____ Field Office (FWS).
4. National Marine Fisheries Service, ____ Field Office (NMFS) *[if applicable]*.
5. Natural Resources Conservation Service, ____ District (NRCS) *[if applicable]*.

[List other signatory agencies who are responsible for review and approval of the bank proposal].

G. Disclaimer: Whereas, this Banking Instrument does not in any manner affect statutory authorities and responsibilities of the signatory parties.

H. Exhibits: Whereas, the following Exhibits are incorporated as appendices to this Banking Instrument:

1. "Exhibit A", Bank location and service area *[include, as appropriate U.S. Geological Survey location map showing location of the Bank (include latitude and longitude information for GIS purposes), topographic map of the Bank showing existing conditions, and Figures of the service area of bank]*
2. "Exhibit B", Bank Development Plan *[list and provide description of the specific activities to be undertaken by the Sponsor, e.g., activities to restore hydrology, detailed planting plans, removal of invasive non-native species; include all plans and specifications, as necessary, to document the proposed work]*
3. "Exhibit C", Crediting and Debiting Procedure for the Bank
4. "Exhibit D", Delineation Report
5. "Exhibit E", Watershed Plan *[if applicable]*
6. "Exhibit F", Real-Estate Provisions *[attach conservation easement, deed restriction or other real estate provisions, as appropriate upon completion]*
7. "Exhibit G", Financial Assurance *[attach appropriate documentation pertaining to the financial assurance arrangements upon completion]*
8. "Exhibit H", Bank Closure Plan *[include description of specific requirements and procedures to be followed by Bank Sponsor to conclude operational phase of bank. Alternatively, these provisions may be included in the Bank Development Plan.]*
and *[Include other Exhibits as appropriate]*.

II. AUTHORITIES

The establishment, use, operation and maintenance of the Bank is carried out in accordance with the following authorities:

A. Federal:

1. Clean Water Act (33 USC 1251 et seq.)
2. Rivers and Harbors Act (33 USC 403)
3. Fish and Wildlife Coordination Act (16 USC 661 et seq.)
4. Regulatory Programs of the Corps of Engineers, Final Rule (33 CFR Parts 320-330)
5. Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 CFR Part 230)
6. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning the Determination of Mitigation Under the Clean Water Act, Section 404 (b)(1) Guidelines (February 6, 1990)
7. Federal Guidance for the Establishment, Use, Operation of Mitigation Banks (60 F.R. 58605 et seq.)

[Include other State, tribal, and/or local authorities, as appropriate.]

NOW, THEREFORE, the parties agree to the following:

III. ESTABLISHMENT OF THE BANK

Sec. II.C.4

A. The Sponsor agrees to perform all necessary work, in accordance with the provisions of this Banking Instrument, to establish and/or maintain ____ acres of aquatic habitat, as shown in Exhibit B, until it is demonstrated to the satisfaction of the agencies represented on the MBRT (acting through the Chair) that the project complies with all conditions contained herein, or until all credits are sold, whichever is later. Work shall include implementing the Bank Development Plan (Exhibit B).

B. The Sponsor will obtain all appropriate environmental documentation, permits or other authorizations needed to establish and maintain the Bank. This Banking Instrument does not fulfill or substitute for such authorization.

C. Establishment of the Bank will be performed in *[indicate whether work is to be conducted in a phased manner or its entirety]* as described in the Bank Development Plan (Exhibit B), and the credits will become available in accordance with the schedule specified in Part IV, Sections D through G of this Banking Instrument. In the event the Sponsor determines that modifications must be made in the Bank Development Plan to ensure successful establishment of habitat within the Bank, the Sponsor shall submit a written request for such modification to the MBRT, through the Chair, for approval. Documentation of implemented modifications shall be made consistent with Part III, Section F *infra*.

D. Financial Assurance Requirements: The Sponsor agrees to provide the following financial assurances for the work described in this Banking Instrument. *[Include information about the specific financial assurance (e.g., performance bond, letter of credit, escrow account) to be provided by the Sponsor. For example, “The Sponsor shall deposit in the following manner:*

Sec. II.E.5

1. ____ in *[identify the financial assurance mechanism, e.g., letter of credit, interest bearing escrow account, etc.]* to be termed *Contingency Funds* and to be used by the Sponsor or a third party to be designated by the Corps in the event the Sponsor fails to comply with the terms of this Banking Instrument to rectify any unforeseen events as determined by the MBRT. In the event that the *Contingency Funds* are not used, *[at the end of the X Year]* the funds shall be returned to the Sponsor.

2. ____ in *[identify the financial assurance mechanism (e.g., an interest bearing trust account)]* to be transferred to *[identify the long-term management entity]* on *[identify the starting date of the maintenance period]*. These funds referred to as the *Long-Term Management Funds* shall only be used by *[long-term management entity]* for managing and maintaining the Bank in perpetuity. *(The cost of long-term management of the bank may be adjusted based on actual annual cost of maintenance that will be provided by the Sponsor in the monitoring reports.)”* *[Note: Many self-maintenance banks may not require long-term management funds.]*

E. Real Estate Provisions: The Sponsor shall *[specify the type of real estate provisions, e.g., conservation easements and/or title transfers. An example is as follows: “The Sponsor shall record a conservation easement on the Bank land prior to certification of any credits in favor of [identify the appropriate party] or its successor. The conservation easement shall preserve the Bank land as wetlands and wildlife habitat in perpetuity. The draft conservation easement documents shall be provided to Corps for approval prior to its recording and copies of recorded documents shall be provided to the Corps”]*.

Sec. II.E.2

F. The Sponsor agrees to submit an as-built report for *[each phase of]* the Bank ____ days following completion of the establishment of the *[that phase of]* bank. The as-built report will describe in detail any deviation from that described in the mitigation plan (Exhibit B), and a plan showing finish grades, and surface and groundwater elevations, as appropriate.

IV. OPERATION OF THE BANK

A. Service Area: The bank is established to provide mitigation to compensate for impacts to the Waters of the United States including wetlands within *[indicate the service area of the bank]* as shown in Exhibit A. Decisions authorizing use of credits from the Bank will be made by the appropriate authority on a case-by-case basis in accordance with applicable requirements.

Sec. II.D.3

B. The Sponsor will allow, or otherwise provide for, access to the site by all signatory parties, as necessary, for the purpose of inspection and compliance monitoring consistent with the terms and conditions of this Banking Instrument. Inspecting parties shall provide reasonable notice, of not less than 24 hours, to the Sponsor, prior to inspection of Bank.

C. Projects Eligible to Use the Bank. For projects requiring authorization under Section 404 and Section 10, the Corps, in consultation with the other regulatory and resource agencies, will determine the eligibility of projects to use the bank on a case-by-case basis. *[To the extent that the Bank may be authorized for use under other Federal, State, tribal, or local programs, it may be appropriate to include a similar clarifying statement.] [It may be appropriate, however, to list examples of the types of activities for which the bank is expected to be used. For example, "In general, it is agreed that the following activities shall typically be eligible to use the bank (provide list of activities, e.g., activities associated with specific projects, activities authorized under certain general permits, activities impacting specific wetland classes)].* Sec. II.D.1

D. Assessment Methodology: Credits and debits will be assessed using *[identify the method for determining credits, and debits, e.g., specific functional assessment methodology, wetland acreage, or other appropriate method]*. Sec. II.D.7

E. Success Criteria: The following criteria will be used to assess project success: *[List appropriate measures of success, e.g., attainment of appropriate wetland hydrology, % coverage (by strata) of vegetation, % species composition/diversity.]* Sec. II.D.6

F. Schedule of Credit Availability: Upon submittal of all appropriate documentation by the Sponsor, and subsequent approval by the Corps *[identify any other authorizing agency(s)]*, in consultation with the other members of the MBRT, it is agreed that credits will become available for use by the Sponsor or for transfer to a third party in accordance with the following schedule: *[Indicate conditions that must be met before credits may become available for debiting, for example:*

Credits will be available for debiting upon satisfaction of the success criteria; or
___ percentage of total anticipated credits will be available for debiting upon approval of this Banking Instrument, maintenance of adequate funds [indicate amount, beneficiary, and the type of financial assurance, e.g., escrow account, letter of credits, or performance bond] for construction, operation, and long-term maintenance, and real estate assurance [indicate type and beneficiary; or

___ percentages of total anticipated credits may be withdrawn immediately after the construction and an initial planting phase has been completed for any given phase of the Bank, provided adequate funds are maintained in [indicate amount, beneficiary, and type of financial assurance] for long-term maintenance of any portion of debited credits; or
___ percentage of total credits will be available for debiting following successful demonstration of attainment of hydrologic criteria as described in Section ___ [see hydrologic success criteria], and provided adequate funds are maintained in [indicate amount, beneficiary, and type of financial assurance] for long-term maintenance of any portion of debited credits.]

G. Conditions on Debiting: *[Include any specific conditions on debiting of credits. The following scenarios are examples: Any credits debited before achieving the success criteria, shall require posting sufficient financial assurance to cover contingency actions in the event of partial or total failure (i.e., \$ X/acre). The form and amount of the assurances shall be approved by the Corps [identify any other authorizing agency(s)], in consultation with the other members of the MBRT, prior to posting. Upon meeting the success criteria as determined by the MBRT, the bond shall be released to the Sponsor.]*

H. Provisions For Uses of the Mitigation Bank Area: The Sponsor shall **NOT** :

1. Grant additional easements, right of way, or any other property interest in or to the project areas without the written consent of the Corps, in consultation with the MBRT.
2. Use or authorize the areas within the Bank for any purpose which interferes with its conservation purposes other than those specified below *[specify any compatible uses. Alternatively, it may be appropriate to include this information in the Bank Development Plan.]*.

V. MAINTENANCE AND MONITORING OF THE BANK

A. Maintenance Provisions: The Sponsor agrees to perform all necessary work to maintain the Bank consistent with the maintenance criteria established in the Bank Development Plan *[the Bank Development Plan should include provisions describing particular maintenance activities, e.g., removal of invasive species, prescribed burning]*. The Sponsor shall continue with such maintenance activities until closure of *[a particular phase of]* the bank. Upon closure of the Bank, the Sponsor shall implement the management requirements established in Part V, Section F *[and as described in the Bank Closure Plan, where applicable]*. Deviation from the approved Bank Development Plan is subject to review and written approval by MBRT, (acting through the Chair).

B. Monitoring Provisions: The Sponsor agrees to perform all necessary work to monitor the Bank to demonstrate compliance with the success criteria established in this Banking Instrument. Work will include *[state frequency, methods, and period of monitoring needed to demonstrate compliance with success criteria. For example:*

1. *Vegetation Survey,*
2. *Wildlife Survey,*
3. *Hydrologic monitoring,*
4. *Other activities]*

C. Reports: The Sponsor shall submit to the Corps, for distribution to the other members of the MBRT, a report describing the conditions of Bank and relating those conditions to the success criteria. Reports will be submitted by the [annual date of report submittal] of each calendar year and contain the following:

[Examples of monitoring report provisions:

1. A U.S. Geological Survey map showing location of the Bank,,
2. A detailed narrative summarizing the condition of the Bank and all regular maintenance activities,
3. Appropriate topographic maps (e.g., 1-2 foot-contour intervals) showing location of sampling plots, permanent photo points, location of transects, etc.
4. Results of hydrology survey including hydroperiod, extent of inundation and depth, groundwater monitoring data, precipitation, etc.
5. Results of vegetation survey including visual estimates of % overall cover and % cover by each vegetation layer, species diversity, % exotic vegetation in each vegetation layer, total % “facultative” and “upland” species in each vegetation layer, survival rate of planted vegetation, an estimate of natural revegetation, and plant vigor as measured by evidence of reproduction.
6. Results of other surveys such as bird, macroinvertebrate, fish surveys, etc.)]

D. Accounting Procedure: The Sponsor shall submit a statement to the Corps [*identify any other authorizing agency(s)*] each time credits are debited or additional credits are approved. If requested, the Corps will distribute the statement to other members of the MBRT. At a minimum, the Sponsor shall submit an annual ledger to the Corps for distribution to all members of the MBRT, showing all transactions at the bank for the previous year.

E. Contingency Plans/Remedial Actions: In the event the Bank [*or a specific phase of the Bank*] fails to achieve the success criteria specified in Part IV, Section E of this Banking Instrument, the Sponsor shall develop necessary contingency plans and implement appropriate remedial actions for the Bank [*or that phase*] in coordination with the MBRT. In the event the Sponsor fails to implement necessary remedial actions within ____ calendar days after notification by the Corps [*identify any other authorizing agency(s)*] of necessary remedial action to address any failure in meeting the success criteria, the MBRT (acting through the Chair) will notify the Sponsor and the appropriate authorizing agency(ies) and recommend appropriate remedial actions. Sec. II.E.4

If the authorizing agency(ies) determines that the Bank is operating at a deficit, debiting of credits will immediately cease, and the authorizing agency(ies), in consultation with the MBRT and the Sponsor, will determine what remedial actions are necessary to correct the situation. As determined by the Chair in coordination with the MBRT and the Sponsor, if conditions at the bank site do not improve or continue to deteriorate within a reasonable time frame from the date that the need for remediation was first identified in writing to the Sponsor by the Chair of the MBRT, the Contingency Funds and the long-term management funds shall be transferred to [*identify the entity*] to undertake corrective measures.

At the request of the Sponsor, the MBRT will perform a final compliance visit to determine whether all success criteria have been satisfied. Upon satisfaction of the success criteria, any remaining contingency funds will be released to the Sponsor.

F. Long-Term Management: *[Specify the responsible entity and source of funds (if required) for long-term management. An example is as follows: “At the end of the active monitoring period, the Sponsor shall transfer the entire long-term management funds and the title to the Bank land to [identify entity responsible for long-term management]. At that time, the [long-term management entity] shall be responsible to manage the Bank in perpetuity in accordance with the terms of the long-term management plans and real estate provisions. Upon signing of this Banking Instrument the long-term management entity concurs and it shall use the long-term management funds specified in Part III, Section D.2 to be used for this purpose only.” (Alternatively, if there is a Bank Closure, incorporate it here by reference.)]* Sec. II.E.2

VI. RESPONSIBILITIES OF THE MBRT

A. The agencies represented on the MBRT agree to provide appropriate oversight in carrying out provisions of this Banking Instrument.

B. The agencies represented on the MBRT agree to review and provide comments on all project plans, *[regular or annual]* monitoring reports, credit review reports, contingency plans, and necessary permits for the Bank in a timely manner. Comments on the monitoring reports and credit review reports will be reviewed within ____ calendar days from the date of complete submittal, except for good cause.

C. The agencies represented on the MBRT agree to review and confirm reports on evaluation of success criteria prior to approving credits within *[each phase of]* the bank.

D. The agencies represented on the MBRT shall conduct compliance inspections, as necessary, as determined by the Corps in consultation with the Sponsor, to verify credits available in the mitigation bank, recommend corrective measures (if any), until the terms and conditions of the Bank Development Plan have been determined to be fully satisfied or until all credits have been sold, whichever is later.

E. *[Include other provisions which specify arrangements agreed upon between the Sponsor and the agencies on the MBRT (e.g., agency monitoring of the bank)].*

VII. OTHER PROVISIONS

A. Force Majeure: The sponsor will not be responsible for bank failure that is attributed to natural catastrophes such as flood, drought, disease, regional pest infestation, etc., that the MBRT, acting through the Chair, determine is beyond the control of the Sponsor to prevent or mitigate [*may include the detailed description of provisions and responsibilities as appropriate*].

B. Dispute Resolution: Resolution of disputes about application of this Banking Instrument shall be in accordance with those stated in the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 F.R. 58605 et seq., November 28, 1995).

Sec. II.C.6

C. Validity, Modification, and Termination of the Banking Instrument: This Banking Instrument will become valid on the date of the last signatory's signature. This Banking Instrument may be amended or modified with the written approval of all signatory parties. Any of the MBRT members may terminate their participation upon written notification to all signatory parties. Participation of the MBRT members will terminate ____ days after written notification.

Sec. II.C.2

D. Specific Language of Banking Instrument Shall Be Controlling: To the extent that specific language in this document changes, modifies, or deletes terms and conditions contained in those documents that are incorporated into the Banking Instrument by reference, and that are not legally binding, the specific language within the Banking Instrument shall be controlling.

[For banks not requiring a Section 10/404 permit to be established, it may be appropriate to include a provision which indicates that the Sponsor is responsible for signing on as an ancillary permittee for all permit actions mitigated at the Bank.]

VI. DEFINITIONS.

[Optional - May include as necessary.]